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Constitutional Law—Religious Freedom—Forced Disclosure of Church Records Pursuant to State Non-Profit Corporation Statute Prohibited. Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986); Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988); Gipson v. Munson, 296 Ark. 160, 752 S.W.2d 752 (1988).

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NOTES

CONSTITUTIONAL LAW—RELIGIOUS FREEDOM—FORCED DISCLOSURE OF CHURCH RECORDS PURSUANT TO STATE NON-PROFIT CORPORATION STATUTE PROHIBITED. *Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986); *Gipson v. Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988); *Gipson v. Munson*, 296 Ark. 160, 752 S.W.2d 752 (1988).

Individual members of the Sixth and Izard Church of Christ in Little Rock brought suit against church elders,[1] asserting the right to examine church records pursuant to Arkansas' Non-Profit Corporation Act[2] and requesting a court-ordered election of the church Board of Directors.[3] The elders refused to comply, arguing that church doctrine prohibited disclosure. The chancery court,[4] however, ordered compliance with a discovery request for the records. The elders appealed this interlocutory order to the Arkansas Supreme Court, contending that such compliance would effect a decision on the merits of the case. The Arkansas Supreme Court remanded for a full evidentiary hearing "on the claim of first amendment protection versus the disclosure requirements of corporations."[5] *Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986) [hereinafter *Gipson I*].

On remand, the chancellor appointed a special master to hear evidence and decide the first amendment question as required by the *Gipson I* decision. The chancery court subsequently adopted the master's recommendations that the elders conduct an election and

1. Each Church of Christ congregation is independent and autonomous, and is governed by a group of elders whose authority to manage church affairs is based on their understanding of certain New Testament teachings on church leadership. Defendant's Responses to Requests for Admissions, Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986) (No. 85-180).

2. ARK. CODE ANN. § 4-28-218 (1987) states in pertinent part: "Each corporation shall keep correct and complete books and records of account. . . . All books and records of a corporation may be inspected by any member for any proper purpose at any reasonable time."

3. The church elders also served as the Board of Directors of the corporation. Plaintiffs desired divulgence of compensation paid to employees, sources of church income, long distance telephone charges, and ballots of the last election of church elders/Board of Directors. Complaint, Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986) (No. 85-180).

4. First Division, Pulaski County, Lee A. Munson, Jr.

5. Gipson v. Brown, 288 Ark. at 429, 706 S.W.2d at 373 [hereinafter *Gipson I*].

make the church records available for inspection. The elders again appealed. The Arkansas Supreme Court held that referring the case to a master had been unwarranted and reviewed the case *de novo*. The court ruled that the dispute between the church members and the elders was essentially religious in nature, and thus its resolution by a civil court was improper. Furthermore, the lack of any evidence of a compelling state interest precluded, as an unconstitutional interference with free exercise of religion, the application of the Arkansas Non-Profit Corporation Act.[6] The court dismissed the appeal. *Gipson v. Brown*, 295 Ark. 371, 749 S.W.2d 297 (1988) [hereinafter *Gipson II*].

When no records were produced, plaintiffs initiated contempt proceedings against the elders, alleging that because the appeal had been dismissed in *Gipson II* the order of the chancellor was still in effect. The elders petitioned for writ of prohibition, seeking a permanent stay of contempt proceedings. The supreme court, in a short *per curiam* opinion, stated that the mandate issued pursuant to *Gipson II* specifically dismissed the chancery decree. Reiterating that the case turned on an impermissible resolution of an intrachurch dispute, the court disposed of the matter by granting the permanent stay requested by the church elders. *Gipson v. Munson*, 296 Ark. 160, 752 S.W.2d 752 (1988) [hereinafter *Gipson III*].

The *Gipson* cases present two first amendment[7] questions. First, may a court constitutionally interfere with a religious dispute? Second, may a church refuse to obey civil law when that law conflicts with church doctrine? An analysis of the Arkansas Supreme Court's handling of *Gipson* therefore requires an examination of judicial treatment of both issues.

I.

A dispute between members of a religious association which finds its way into the civil courts is generally characterized as an entanglement issue, presenting the question of whether judicial resolution of the dispute is within the authority of the court or whether such an action is proscribed by the constitution. This entanglement problem is one which is not easily categorized in a first amendment context, for the issues it presents are subject to scrutiny under both the establish-

6. Gipson v. Brown, 295 Ark. 371, 749 S.W.2d 297 (1988) [hereinafter *Gipson II*].

7. The relevant section of the first amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

ment clause and the free exercise clause.[8] When judicial involvement in a religious dispute interferes with the church's right to resolve its own internal affairs, it violates the constitutional prohibition on government interference with the free exercise of religion.[9] However, the establishment clause is implicated when an intrachurch dispute based on religious doctrine is presented to a court for resolution. A judgment for either side in the litigation gives state sanction to religious beliefs and in effect "establishes" the doctrinal views propounded by the party receiving the benefit of the court's ruling.[10]

The United States Supreme Court first examined the manner in which a civil tribunal should hear a case involving an intrachurch dispute in *Watson v. Jones*.[11] *Watson* involved a disagreement among members of the Walnut Street Presbyterian Church in Louisville, Kentucky, over control of church property. During the Civil War the congregation split into antislavery and proslavery factions, with the latter breaking with the church hierarchy and joining the Presbyterian Church of the Confederate States.[12] Determining which group represented the "true" congregation was central to the question of which faction was entitled to possession of church property.[13] In ruling for the antislavery faction, the Supreme Court established what has become known as the "deference principle" for judicial resolution of intrachurch disputes.[14]

When confronted with an intrachurch dispute, the deference principle requires a court to accept the decision which has been rendered by the established authority of the church in question. In *Watson* the ruling body of the denomination with which the Walnut Street Church was originally affiliated had declared that the antislavery faction represented the church's true congregation and therefore was entitled to ownership of the church property.[15] The Supreme Court deferred to this determination, reasoning that the church hierarchy was better equipped to arrive at the correct conclusion than a civil court unfamiliar with ecclesiastical law.[16]

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8. *See infra* text accompanying notes 27-37.

9. *See infra* text accompanying notes 27-32.

10. *See infra* text accompanying notes 33-37.

11. 80 U.S. (13 Wall.) 679 (1871).

12. *Id.* at 695-96.

13. *Id.* at 717.

14. *Id.* at 727.

15. *Id.* at 734. The ruling authority of the Walnut Street Church was the General Assembly of the Central Presbyterian Church of the United States. *Id.* at 695.

16. *Id.* at 729. In ascertaining where church authority lay, the *Watson* opinion distinguished congregational churches from hierarchical churches. A congregational church is au-

A reliance on "the ordinary principles which govern voluntary associations"[17] was critical to the *Watson* Court's formulation of the deference principle. One who chooses to associate with a religious organization does so with implicit acquiesence to the polity[18] and practices of that church. "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it."[19] Those who later question decisions made by the recognized authority of the church therefore cannot appeal to the civil courts for redress of their grievances.[20]

Almost sixty years after *Watson* the deference principle was modified somewhat in *Gonzalez v. Roman Catholic Archbishop of Manila*.[21] After citing *Watson*[22] as authority for affirming the right of the Catholic hierarchy to determine qualifications for the priesthood without civil court direction,[23] the Court said that decisions of proper church authorities are to be accepted in secular courts "[i]n the absence of fraud, collusion, or arbitrariness."[24]

Both *Watson* and *Gonzalez* were pre-*Erie*[25] cases decided on federal common law grounds rather than first amendment principles.[26] The rationale of the deference principle was first given constitutional underpinnings in *Kedroff v. St. Nicholas Cathedral*.[27] Kedroff challenged a New York statute which attempted to transfer administrative

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tonomous, "governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government." *Id.* at 724. A hierarchical church, such as the Presbyterian church in *Watson*, is "itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government." *Id.* at 726. Under both forms of church government a decision as to ownership of church property made by the recognized authority is not subject to review by a civil court. *Id.* at 725, 727.

17. *Id.* at 725.

18. Polity refers to "the particular system of church government upon which church members have agreed, including the structural allocation of authority within the church and the established grievance procedures for resolving internal disputes." Adams and Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. PA. L. REV. 1291, 1292 n.5 (1980).

19. *Watson*, 80 U.S. (13 Wall.) at 729.

20. *Id.*

21. 280 U.S. 1 (1929) (modification resulted from dicta in opinion by Brandeis, J.).

22. *Id.* at 16.

23. *Id.*

24. *Id.*

25. Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938) (federal courts should apply relevant state common law in diversity cases).

26. The religion clauses of the first amendment were applied to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise) and Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment).

27. 344 U.S. 94 (1952).

control of the Russian Orthodox Church in that state from the traditional authority in Moscow to a governing body in the United States.[28] An ensuing property dispute hinged on which church organization had the right to appoint the head of the New York diocese. The right had previously belonged to the central hierarchy in Moscow, and the Court found nothing to indicate a relinquishment of that right.[29] The Court relied on the deference principle enunciated in *Watson*[30] and concluded that the New York statute unconstitutionally infringed on the church's right to select its clergy.[31] Such a right, the Court declared, "[M]ust now be said to have federal constitutional protection as part of the free exercise of religion against state interference."[32]

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church[33] addressed the question of whether an establishment clause violation is implicit in a secular court resolution of a religious doctrinal dispute. The Georgia Supreme Court had affirmed a jury finding that the general church had deviated from established church doctrine. The local congregations which had withdrawn from the hierarchy in protest were therefore entitled to control of their church facilities.[34] The Supreme Court reversed,[35] holding that a state-sanctioned determination of whether a religious organization has departed from the teachings under which it was founded "requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the first amendment forbids civil courts from playing such a role."[36] However, the Court questioned the utility of the deference principle as an absolute means for avoiding court establishment of religious beliefs and suggested an alternative method for resolving intrachurch disputes based on "neutral principles of law."[37]

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28. *Id.* at 98.

29. *Id.* at 120.

30. "The [*Watson*] opinion radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116.

31. *Id.* at 119.

32. *Id.* at 116.

33. 393 U.S. 440 (1969).

34. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 224 Ga. 61, 159 S.E.2d 690 (1968), *rev'd*, 393 U.S. 440 (1969).

35. 393 U.S. at 452.

36. *Id.* at 450.

37. The Court stated that:

Hull Church thus provided authority for secular resolution of church property disputes. If a court could base its decision on neutral principles of law without delving into questions of church orthodoxy, a ruling in favor of either party would not violate the first amendment.[38]

The deference principle, however, was by no means dead. It was reasserted by the Court in 1976 in *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich*.[39] The case involved a decision by the church's highest governing body, the Holy Assembly, to split the American-Canadian Diocese[40] and simultaneously suspend a bishop.[41] The Supreme Court of Illinois had applied "neutral principles," looking to the written church constitution and affiliation agreements, and ruled the Holy Assembly in violation thereof in its decision to divide the diocese. The court had also found the removal of the bishop arbitrary under *Gonzalez*.[42] The Supreme Court reversed, holding that the Illinois court had embarked upon a forbidden inquiry into the polity of the Serbian Orthodox Church.[43] Citing *Watson* at length, the Court stated that judicial forays into the propriety of internal church administration necessarily required an examination of church doctrine and could not be justified as a review of an "arbitrary" church practice.[44]

> Civil courts do not inhibit the free exercise of religion merely by opening their doors to disputes involving church property. And there are *neutral principles of law*, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded.

Id. at 449 (emphasis added).

38. The Supreme Court upheld application of neutral principles a year later in Maryland & Virginia Eldership of the Church of God v. Church of God, Inc., 396 U.S. 367 (1970) (per curiam), affirming a lower court decision which had relied on state religious corporation statutes and property law in rejecting a governing church body's claim to real estate of two dissident churches. *Id.* at 367-68. In a concurring opinion, Justice Brennan voiced support of either neutral principles or the deference approach so long as neither necessitated court inquiry into religious doctrine or church law. *Id.* at 368-70 (Brennan, J., concurring).

39. 426 U.S. 696 (1976). For an analysis of the case, *see* Note, *The Role of Civil Courts in Church Disputes*, 1977 WIS. L. REV. 904.

40. 426 U.S. at 703.

41. *Id.* at 703-04.

42. Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevich, 60 Ill. 2d 477, 328 N.E.2d 268 (1975).

43. 426 U.S. at 709.

44. The Court observed that:

> [I]t is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Justice Rehnquist dissented,[45] decrying the majority's reversion to the deference principle as a vehicle by which civil courts "can easily be converted into hand-maidens of arbitrary lawlessness."[46] Criticizing the Court's reliance on *Watson*, Rehnquist pointed out that neither *Watson* nor *Gonzalez* had been decided on constitutional principles, and therefore neither was relevant to the issue presented by *Milivojevich*.[47] He argued that while the Supreme Court decisions since *Kedroff* justifiably required civil courts to refrain from placing their weight behind any particular religious doctrine or belief, nothing in the record of the case at bar indicated that the Illinois court had done so.[48] The lower court's application of neutral principles was therefore correct. Moreover, the majority's resurrection of *Watson*'s deference approach was not only unwarranted under prior decisions of the Court, but was itself fraught with the potential for constitutional violations under the establishment clause.[49]

Three years after *Milivojevich*, the Supreme Court, in a five-to-four decision, addressed the dichotomy it had created for resolution of intrachurch disputes. *Jones v. Wolf*[50] established a three-step analysis which incorporated both the "neutral principles" and the "deference" approaches. First, a court must determine if the dispute can be resolved without an inquiry into religious doctrine.[51] If so, then the court is free to settle the disagreement based on neutral principles of law. Such a decision may be founded on a secular scrutiny of reli-

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Id. at 714-15 (citation omitted).

45. *Id.* at 725 (Rehnquist, J., dissenting).

46. *Id.* at 727.

47. *Id.* at 732-33. *See supra* text accompanying note 25.

48. *Id.* at 732-33.

49. *Id.* at 734. Justice Rehnquist cautioned that:

> Such blind deference . . . is counseled neither by logic nor by the First Amendment. To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause.

Id.

50. 443 U.S. 595 (1979) (Blackmun, J., joined by Brennan, Marshall, Rehnquist, and Stevens, J.J.).

51. *Id.* at 602 (citing *Milivojevich*, 426 U.S. 696 (1976) and Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, Inc., 396 U.S. 367 (1970)). Significantly, *Wolf* abandoned the necessity for a congregational/hierarchical distinction, stating that "all forms of religious organization and polity" were amenable to its approach. *Id.* at 603. On this point the four dissenters agreed: "[t]he proper rule of decision . . . requires a court to give effect in all cases to the decisions of the church government agreed upon by the members before the dispute arose." *Id.* at 614 (Powell, J., dissenting, joined by Burger, C.J., Stewart and White, J.J.).

gious documents such as church constitutions, corporate charters, and deeds.[52] However, if examination of such documents reveals the necessity for religious interpretation, then civil courts must again defer to the established church authority's resolution of the dispute.[53]

The *Wolf* majority believed that application of this approach would "free civil courts completely from entanglement in questions of religious doctrine, polity, and practice."[54] The decision has been the subject of criticism, however, for it fails to resolve the problem of where secular scrutiny of a church dispute ends and civil inquiry into religious doctrinal matters begins.[55]

All of the Supreme Court cases except *Gonzalez*[56] involved a property dispute. The great majority of reported cases from lower courts also involve conflict among church factions over legal ownership of property.[57] Early cases were decided on state common law grounds, under the general rule that courts could resolve intrachurch disputes over property rights.[58] However, most courts felt free when adjudicating property disputes to determine, as did the Georgia court in *Hull Church*, whether a faction or member of the church had deviated from the church's purported doctrine.[59] State courts, however, generally refrained from deciding cases where property rights were not in controversy.[60]

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52. *Id.* at 604.

53. *Id.*

54. *Id.* at 603.

55. *See* Adams and Hanlon, *supra* note 18, at 1322-23; Ellman, *Driven from the Tribunal; Judicial Resolution of Internal Church Disputes*, 69 CAL. L. REV. 1380, 1400 (1981).

56. 280 U.S. 1 (1929).

57. For a discussion of civil courts' involvement in disputes of this type, *see* Note, *Judicial Intervention of Church Property*, 75 HARV. L. REV. 1142 (1962), and Note, *Judicial Property Disputes—Some Constitutional Considerations*, 74 YALE L.J. 1113 (1965).

58. *See, e.g.*, Bomar v. Mt. Olive Missionary Baptist Church, 92 Cal. App. 618, 268 P. 665 (1928) (suit by trustees to compel reconveyance of church property was within court's jurisdiction); Thomas v. Lewis, 224 Ky. 307, 6 S.W.2d 255 (1928) (court had jurisdiction over conflicting claim to church property); Geiss v. Trinity Lutheran Church Congregation, 119 Neb. 745, 230 N.W. 658 (1930) (controversy over title and possession of church building outside jurisdiction of ecclesiastical authority).

59. *See, e.g.*, Yanthis v. Kemp, 43 Ind. App. 203, 85 N.E. 976 (1908) (evidence that church majority had deviated from standards of Christian morality sufficient to warrant court award of church property to minority faction); *In re* Stuart's Estate, 184 Iowa 165, 168 N.W. 779 (1918) (evidence pertaining to the sacraments warranted award of property to faction whose beliefs were consistent with grantor); Nagle v. Miller, 275 Pa. 157, 118 A. 670 (1922) (local church had not departed from doctrine to a degree that necessitated division of church property).

60. *See, e.g.*, Lewis v. Voliva, 154 Ill. App. 48 (1910) (determination of church's rightful minister); Carter v. Papineau, 222 Mass. 464, 111 N.E. 358 (1916) (dispute over explusion of church member).

Even after the Supreme Court decisions in *Kedroff* and *Hull Church*, many jurisdictions continued to decide intrachurch property disputes based on state precedent rather than constitutional principles.[61] Supreme Court decisions influenced some state courts, however, and a few began to reject as unconstitutional civil resolution of a church dispute if it required a determination of the church's "true" teachings.[62] With the formulation of the neutral principles approach in *Hull Church* and its subsequent affirmation in *Wolf*, lower courts found authority for looking to church documents when possible to resolve disputes.[63] However, in cases turning on a question of church doctrine or religious belief, the deference principle continued to be applied, with courts ruling that in such a circumstance the adjudication of the dispute was beyond a civil court's jurisdiction under the first amendment.[64]

A recent case involving discord within an Hassidic Jewish sect is factually similar to *Gipson*. In *Congregation Beth Yitzhoc v. Briskman*[65] members of the temple brought an action under the federal RICO[66] statute for an injunction, an accounting, damages, and attorneys' fees. They alleged that the congregation's funds were being misused and that those in control of the funds were operating without authority.[67] Although questioning whether the case fell under the

61. *See, e.g.*, Ogden Street Church of God in Christ v. Gospel Temple Church of God in Christ, 522 P.2d 757 (Colo. App. 1974) (members of congregation allowed legal redress to protect property right); Mills v. Yount, 393 S.W.2d 96 (Mo. App. 1965) (diversion from doctrine reviewable to determine property right).

62. *See, e.g.*, Pfeifer v. Christian Science Comm. on Publications for Ill., 31 Ill. App. 3d 845, 334 N.E.2d 876 (1975); Nolynn Ass'n of Separate Baptists in Christ v. Oak Grove Separate Baptist Church, 457 S.W.2d 633 (Ky. 1970), *cert. denied*, 401 U.S. 955 (1971).

63. *See, e.g.*, Draskovich v. Pasalich, 151 Ind. App. 297, 280 N.E.2d 69, *reh'g granted*, 153 Ind. App. 30, 285 N.E.2d 830 (1972), *cert. denied*, 414 U.S. 976 (1973) (examination of church documents permissible to ascertain church organization and polity); Piletich v. Deretich, 328 N.W.2d 696 (Minn. 1982) (language of deeds, terms of church charter, and general rules of property law relied upon to resolve property dispute); Western Penn. Conference of United Methodist Church v. Everson Evangelical Church of Am., 454 Pa. 434, 312 A.2d 35 (1973).

64. *See, e.g.*, Crowder v. Southern Baptist Convention, 828 F.2d 718 (11th Cir. 1987) (resolution of dispute over parliamentary procedure at church convention not within court's jurisdiction); Anderson v. Worldwide Church of God, 661 F. Supp. 1401 (D. Minn. 1987) (plaintiffs could not maintain action for fraud to recoup contributions to church's effort to prepare for millenium, when defendants showed that church ministers truly believed the world was coming to an end); Nunn v. Black, 506 F. Supp. 444 (W.D. Va. 1981) (dissident members expelled for speaking in tongues could not maintain action against church).

65. 566 F. Supp. 555 (E.D.N.Y. 1983).

66. Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1961-68 (1982).

67. 566 F. Supp. at 556.

RICO statute, the court declined to base its decision on that issue.[68] Instead, it held that the case was nonjusticiable because the dispute over control of funds centered on a determination of who under church law was the rightful leader of the congregation.[69] Citing *Wolf, Milivojevich* and *Kedroff*, the court determined that resolution of the allegations of fraud required first and foremost a decision as to the proper succession to the position of congregational leader. Such a decision was deemed improper for a civil court.[70]

Prior to *Gipson*, Arkansas cases involving intrachurch disputes were generally limited to disagreements over control of church property,[71] and the basis for their resolution parallels that of the decisions in other jurisdictions previously discussed.[72] Arkansas's leading case on this issue, *Sanders v. Baggerly*,[73] concerned a property dispute between factions of a Presbyterian church. Relying on the reasoning of *Watson v. Jones*,[74] the court stated the "well-established" rule that civil courts have no jurisdiction over cases involving only questions of church doctrine.[75] Subsequent cases follow this same rationale, with the Arkansas Supreme Court refusing to determine controversies relating to "the calculation and disposition of the tithe, the form of church government, the right of the pastor to 'disfellowship' a member,"[76] or the authority of a governing body to dismiss local minis-

68. *Id.* at 557-58.

69. *Id.*

70. *Id.* at 558. The court reasoned that:

> Defendants contend that the Skolyer Rebbe exercises "complete, unquestioned and final" authority over all aspects of the affairs of his Congregation . . . . Under this view, defendants, who never accepted the new Skolyer Rebbe, were entitled to manage plaintiffs' affairs as they saw fit. This Court is not in a position to ascertain whether defendants' understanding of the Skolyer Rebbe's prerogatives reflects applicable religious law. It is therefore apparent that an issue of religious doctrine must be decided before it can be determined whether the defendants' acts were wrongful.

Id.

71. *See infra* notes 73-82 and accompanying text.

72. *See supra* notes 59-63 and accompanying text.

73. 96 Ark. 117, 131 S.W. 49 (1910).

74. 80 U.S. (13 Wall.) 679 (1872).

75. 96 Ark. at 132, 131 S.W. at 55.

> Civil courts will not assume jurisdiction of controversies purely over matters of church doctrine or discipline, where no property rights are involved; that civil courts will assume jurisdiction only of causes involving civil or property rights, and, in such causes, when questions arise concerning matters of church doctrine or discipline which have been decided by a church court vested with such jurisdiction by church laws, the civil courts accept as final and conclusive the decisions of the ecclesiastical court.

Id.

76. Elston v. Wilborn, 208 Ark. 377, 377-78, 186 S.W.2d 662, 663 (1945).

ters.[77] However, the great majority of Arkansas cases involve a dispute between factions of a church over which group is entitled to ownership and control of church property.[78]

Based on reasoning implicit in *Sanders*, the Arkansas Supreme Court in *Holiman v. Dovers*[79] adopted the general rule that civil courts have jurisdiction over disputes arising within a congregational church because "[t]here is no recourse within the denomination."[80] The court has consistently adhered to the precept that since majority rule governs a congregational church, if the majority adheres to church doctrine, it is the true representative of that congregation.[81] As in most other jurisdictions, Arkansas allows court determination of whether a particular faction in the dispute had departed from church doctrine. Ascertainment of which faction represented the majority of the church is usually facilitated by a court-sanctioned vote by the members of the church.[82]

None of these Arkansas cases were decided on constitutional principles, and only *Sanders*[83] mentions any decisions of the United States Supreme Court.[84] The rulings in the *Gipson* case are the first in Arkansas to address the *constitutional* implications of civil adjudication of an intrachurch dispute.

II.

While the nature of the controversy in *Gipson* compelled judicial consideration of an intrachurch dispute, that issue was inextricably intertwined with the problem posed by a conflict between civil law, the Arkansas Non-Profit Corporation Act,[85] and religious doctrine

77. Kinder v. Webb, 239 Ark. 1101, 396 S.W.2d 823 (1965).

78. *See infra* notes 79-82 and accompanying text.

79. 236 Ark. 211, 212, 366 S.W.2d 197, 199 (1963).

80. *Id.* at 212, 366 S.W.2d at 199. Other jurisdictions also rely on this principle. *See, e.g.*, Manning v. Yeager, 201 Ala. 559, 79 So. 19 (1918); Woodrum v. Burton, 88 W. Va. 322, 107 S.E.102 (1921).

81. Cases were decided on the premise that the majority rules unless it has so departed from its original principles that church beliefs are discredited. Such a deviant majority is not allowed to divert church property to support any doctrine or practice which the founding church opposed. *See, e.g.*, Williams v. Cupp, 268 Ark. 1015, 1017, 597 S.W.2d 855, 856 (1980); Ables v. Garner, 220 Ark. 211, 214, 246 S.W.2d 732, 734 (1952); Booker v. Smith, 214 Ark. 102, 108, 214 S.W.2d 513, 515 (1948). *See also* Annotation, *Change of Denominational Relations or Fundamental Doctrines by Majority Faction of Independent or Congregational Church as Ground for Award of Property to Minority*, 15 A.L.R.3d 29 (1967).

82. Rush v. Yancey, 233 Ark. 883, 884, 349 S.W.2d 337, 339 (1961); *Ables*, 220 Ark. at 220, 246 S.W.2d at 734; *Booker*, 214 Ark. at 108, 214 S.W.2d at 515.

83. 96 Ark. 117, 131 S.W. 49.

84. *Id.* at 120-22, 131 S.W. at 50.

85. ARK. CODE ANN. § 4-28-218 (1987).

which prohibited examination of church records as specified in that statute.

The first amendment's free exercise clause is clearly implicated when religious beliefs and practices oppose the mandates of secular law. A court must give strict scrutiny to the purpose of the civil law and find a "compelling" state interest before requiring compliance in contravention of religious beliefs.[86] If the court concludes that the state interest sufficiently outweighs the right to free exercise of religion without government interference, it may compel the religious organization to comply with the law.[87] For example, the United States Supreme Court ruled in *Reynolds v. United States*[88] that a Mormon cannot have more than one wife, regardless of the teaching of his church. The Court recognized that to allow all religiously-founded behavior would "in effect . . . permit every citizen to become a law unto himself."[89]

However, a Seventh-Day Adventist whose religion prohibits work on Saturday cannot be denied unemployment benefits for refusal to accept a job which requires it.[90] Nor can the state prohibit Amish parents from educating their children at home[91] or require any individual to declare his belief in God as a prerequisite for holding public office.[92]

Arkansas cases applying this "balancing test" are few, and the scales have tipped heavily in favor of the government interest. In *Cude v. State*[93] a father refused to allow his children to be vaccinated against smallpox.[94] The court held that the state interest in protecting public health and safety mandated administration of the vaccine

86. Sherbert v. Verner, 374 U.S. 398 (1963). "[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

87. Cantwell v. Connecticut, 310 U.S. 296 (1940) (Court balanced state interest in preserving public peace with Jehovah's Witnesses' right to solicit contributions).

88. 98 U.S. 145 (1878).

89. *Id.* at 167. The following analogy prefaced this conclusion:

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

Id. at 166.

90. Sherbert v. Verner, 374 U.S. 398 (1963).

91. Wisconsin v. Yoder, 406 U.S. 205 (1972).

92. Torcaso v. Watkins, 367 U.S. 488 (1961).

93. 237 Ark. 927, 377 S.W.2d 816 (1964).

94. *Id.* State Department of Education regulations required the vaccination before children could attend school. *Id.*

notwithstanding the religious beliefs of the parent.[95]

Similarly, in *Burrow v. State*[96] the court held that compliance with the state's mandatory school attendance statute did not infringe upon a parent's first amendment rights.[97] Burrow contended that his religious beliefs[98] demanded education of his children at home. The court rejected this argument, distinguishing the case from the "exceptional considerations" of *Wisconsin v. Yoder*[99] and concluding that on balance the state's interest in seeing that its children received proper education outweighed the plaintiff's right to free exercise of religion.[100]

In *Abram v. City of Fayetteville*[101] the court implicitly balanced a city's interest in zoning ordinance enforcement against a church's right to operate a parochial school in violation of those laws. The court distinguished between "an infringement upon a religious *belief*, which is absolutely prohibited, and a limitation upon a religious *action*, which is subject to reasonable laws designed to protect the public health or welfare,"[102] and held that requiring church compliance with the ordinance was not prohibited under the first amendment.[103]

The provision of the Arkansas Non-Profit Corporation Act requiring disclosure of records[104] provoked the religious freedom question in *Gipson*. Although litigation entailing a church's status as a non-profit corporation is not uncommon,[105] the statute plays no part in any prior Arkansas cases. Few cases from other jurisdictions in which incorporation is relevant involve the issue of statutorily-directed disclosure of records.

When a church corporation is acting in a business capacity,

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95. *Id.* at 934, 377 S.W.2d at 819. *Cude* was cited in a similar ruling in Wright v. DeWitt School Dist. No. 1, 238 Ark. 906, 908, 385 S.W.2d 644, 646 (1965).

96. 282 Ark. 479, 669 S.W.2d 441 (1984).

97. *Id.* at 482, 669 S.W.2d at 442.

98. Burrows' beliefs apparently were not held pursuant to the doctrine or teachings of any organized church or traditional religious faith. While the court did not question his sincerity, the lack of orthodox authority for these beliefs was implicitly relevant to its decision.

99. 406 U.S. 205 (1972). The *Burrow* court distinguished *Yoder* because that case involved Amish parents who were concerned about the effects of organized education on three centuries of religious beliefs. The appellant in *Burrow* made no comparable showing. 282 Ark. at 482, 669 S.W.2d at 442.

100. Arkansas law now allows parents to educate their children at home, pursuant to the provisions of ARK. CODE ANN. §§ 6-15-501 to 507 (1987).

101. 281 Ark. 63, 661 S.W.2d 371 (1983).

102. *Id.* at 65, 661 S.W.2d at 372.

103. *Id.*

104. ARK. CODE ANN. § 4-28-218 (1987).

105. *See infra* notes 107-10 and accompanying text.

courts find no constitutional conflict in requiring compliance with state corporation statutes.[106] Moreover, courts usually have no problem exercising jurisdiction over a suit by members of an incorporated church which asks for relief by way of an injunction or accounting pursuant to state law.[107] While such actions are similar to that brought by the *Gipson* plaintiffs, those cases generally present no questions of religious doctrine and the defendants assert no first amendment rights when refusing to comply with the statute. The opinions from Louisiana courts considered by the Arkansas court in *Gipson I*,[108] both of which involved suits for accounting, election of directors, and divulgence of church records, address the constitutional question of forced compliance with state corporation statutes. However, in those cases the courts concluded that the first amendment issue was not a pertinent factor, for no questions of religious doctrine were present.[109]

Two California cases which involved production of church records provide a somewhat different set of facts. *Worldwide Church of God, Inc. v. California*[110] involved an action by the state attorney general rather than a suit by church members. Pursuant to authority granted by state law, the attorney general instituted procedures seeking an accounting of the church's finances and a request that it be placed in receivership.[111] The state alleged that the organization's funds were being diverted for private purposes.[112] The Church of God resisted court-ordered discovery requests and countered with a

106. *See, e.g.*, Free for All Missionary Baptist Church v. Southeastern Beverage and Ice Equip., 135 Ga. App. 498, 218 S.E.2d 169 (1975) (church attempt to rescind rental agreement for use of liquor dispensing equipment unsuccessful); Crest Chimney Cleaning Co. v. Ahi Ezer Congregation, 62 Misc. 2d 1040, 310 N.Y.S.2d 217 (N.Y. Civ. Ct. 1970) (congregation incorporated under state religious corporation law could not avoid paying for labor and materials for work done on rental property).

107. *See, e.g.*, Hollins v. Edmonds, 616 S.W.2d 801 (Ky. Ct. App. 1981) (church members could maintain action for an accounting and election of directors of church corporation under state statute); Thomas v. Craig, 424 So. 2d 1090 (La. App. 1982) (suit to enjoin, *inter alia*, actions of pastor prohibited by state incorporation laws was within court's jurisdiction); Miller v. McClung, 4 Mich. App. 714, 145 N.W.2d 473 (1966) (church members who protested sale of property by church leadership allowed to maintain civil action for injunction and accounting pursuant to corporate status of church).

108. 288 Ark. 422, 427-29, 706 S.W.2d 369, 372-73 (1986).

109. Bourgeois v. Landrum, 396 So. 2d 1275, 1277-78 (La. 1981); Wilkerson v. Battiste, 393 So. 2d 195, 197 (La. App. 1980).

110. 623 F.2d 613 (9th Cir. 1980).

111. *Id.* at 614.

112. *Id.*

civil rights suit[113] in federal court, charging that state supervision of a religious institution was unconstitutional. The Ninth Circuit declined to rule on the constitutionality of the California Corporations Code provision under which the action against the church had been filed, but indicated that investigation of fraud in a charitable institution was "a state interest similar to the magnitude of controlling state welfare fraud."[114] This interest pointed to the conclusion that "[it] is unquestioned that the state attorney general may constitutionally investigate and supervise the affairs of some charitable corporations."[115]

In *Church of Hakeem, Inc. v. Superior Court*[116] members of a religious organization sought disclosure of the church membership list in conjunction with an action involving allegations of fraud and breach of fiduciary duty.[117] Church leadership resisted on constitutional grounds, contending that release of the members' names violated the right of associational privacy.[118] The court agreed, finding that no compelling state interest required the church to comply with a discovery request for a list of its members.[119] The case was distinguished from those in which the very nature of the Ku Klux Klan and the Communist party warranted production of their membership lists.[120]

This exploration into the legal precedent of the issues presented by *Gipson* would not be complete without mention of the Oklahoma Supreme Court's recent decision in a case which received nationwide publicity. *Guinn v. The Church of Christ of Collinsville*[121] concerned an action by a former parishioner against the church and its leadership for invasion of privacy. The plaintiff had been publicly chastised before the congregation for having a sexual relationship outside marriage.[122] Evidence at trial established that belief in the propriety of

113. The church filed an action under 42 U.S.C. § 1983 which prohibits deprivation of constitutional rights under color of state law. 42 U.S.C. § 1983 (1982).

114. 623 F.2d at 616.

115. *Id.* The church's civil rights suit and request for an injunction was maintainable only if they alleged bad faith on the part of the state, and the case was therefore remanded to allow amendment of its complaint. *Id.*

116. 110 Cal. App. 3d 384, 168 Cal. Rptr. 13 (1980).

117. The plaintiffs wanted the list to support their contention that others had similar complaints and that therefore the case should proceed as a class action. *Id.* at 390, 168 Cal. Rptr. at 16.

118. *Id.*

119. *Id.*

120. *Id.* at 389, 168 Cal. Rptr. at 16 (citing Communist Party v. Control Board, 367 U.S. 1 (1961) and Bryant v. Zimmerman, 278 U.S. 63 (1928)).

121. 775 P.2d 766 (Okla. 1989).

122. *Id.* at 767-69.

such an open admonition was based on the church's interpretation of the New Testament, and that the plaintiff was aware of this facet of church doctrine when she became a member.[123] It was also established that the plaintiff's suit was not rooted in any dispute with the church over matters of biblical interpretation. Instead, her claim was founded on the premise that, religious beliefs notwithstanding, the church's disciplinary measures amounted to tortious conduct.[124] The Oklahoma court overturned a jury verdict for the plaintiff on constitutional grounds.[125] Reasoning that she had become a member of the congregation fully aware of the challenged practice, the court decided that the free exercise clause of the first amendment prohibited a court determination of the accuracy of the church's biblical authority for that practice. The court concluded that to allow recovery of damages in such a case would constitute state interference with religious beliefs.[126] The decision was expressly based on a balancing of the state's interest in enforcing common law tort principles of defamation with the right of the church to discipline a wayward member according to what it believed was a biblical mandate.[127] The analysis found free exercise of religion to be paramount, for the church's actions in that case did not pose a substantial "threat to 'public safety, peace or order.' "[128]

III.

The Arkansas Supreme Court explicitly separated the entanglement issue from the free exercise issue in the *Gipson* opinions. In *Gipson I* the court considered whether the church elders' refusal to comply with the Non-Profit Corporation Act deserved first amendment protection.[129] While citing Louisiana decisions which allowed church members to inspect church records under a similar statute,[130] the court recognized the potential for an unconstitutional inquiry into

123. *Id.* at 774.

124. *Id.* at 777-78.

125. *Id.* at 785-86.

126. *Id.* at 769-73.

127. *Id.* at 773-75.

128. *Id.* at 771 n.16 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963)). The Oklahoma court's opinion in *Guinn* contains a thorough analysis of Supreme Court precedent on both intrachurch disputes and the "free exercise" of religion issue.

129. 288 Ark. 422, 427-29, 706 S.W.2d 369, 372-73 (1986).

130. *Id.* at 427-29, 706 S.W.2d at 373 (citing Bourgeois v. Landrum, 396 So. 2d 1275 (La. 1981) and Wilkerson v. Batiste, 393 So. 2d 195 (La. App. 1980)).

church doctrine.[131] However, the court was unable to ascertain from the record before it whether forced compliance with the statute would be a violation of the church's right to free exercise of religion. The case was therefore remanded to the chancellor for an evidentiary hearing on that issue.[132]

The *Gipson II* opinion expressed strong disapproval of the trial court's referral of a case such as this to a special master.[133] Such referral was not warranted "by reason of anticipation of a lengthy trial, complexity of the issues and congestion of the court's calendar."[134] Citing Rule 53(b) of the Arkansas Rules of Civil Procedure,[135] the court declared that routine reference to a master was acceptable only in "matters of accounting and difficult computation of damages," and otherwise only "upon a showing that some exceptional condition requires it."[136] Declaring that the improper use of a master without such a showing was itself grounds for dismissing the present appeal, the court instead concluded that *de novo* review of the case was appropriate[137] in the interests of bringing this protracted litigation to an end.[138]

The court then examined the United States Supreme Court decisions on intrachurch disputes, first citing *Watson v. Jones*[139] as authority for the premise that civil court involvement in church matters which requires an inquiry into religious law and custom "deprives these bodies of the right to interpret their own church laws and opens

131. *Id.* at 428, 706 S.W.2d at 373. "Here appellants assert the very entanglement in questions of religious doctrine that the court found absent in the Louisiana cases." *Id.*

132. *Id.*

133. 295 Ark. 371, 375-76, 749 S.W.2d 297, 299 (1988).

134. *Id.* (citing State v. Nelson, 246 Ark. 210, 438 S.W.2d 33 (1969)).

135. Rule 53(b) provides in pertinent part:

> A reference to a master shall be the exception and not the rule. Reference shall be made in only those cases where there is no right to trial by jury or where such right has been waived. Except in matters of account and difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

ARK. R. CIV. P. 53(b).

136. 295 Ark. at 376, 749 S.W.2d at 299.

137. *Id.* The court stated that "this court generally reviews matters appealed from chancery court on a *de novo* basis." *Id.* at 374, 749 S.W.2d at 298 (citing Lynch v. Brunner, 294 Ark. 515, 745 S.W.2d 115 (1988)). *See also* Potter v. Easley, 288 Ark. 133, 703 S.W.2d 442 (1986); City of Little Rock v. Cash, 277 Ark. 494, 664 S.W.2d 229 (1982), *cert. denied*, 462 U.S. 1111 (1982); Ferguson v. Green, 266 Ark. 556, 587 S.W.2d 18 (1979).

138. The original complaint in the case was filed almost four years earlier on November 2, 1984. *See supra* note 3.

139. 80 U.S. (13 Wall.) 679 (1871).

the door to all sorts of evils."[140] *Gonzalez*,[141] *Milivojevich*,[142] and *Wolf*[143] were included as support for the deference approach: "[w]hen religious organizations establish rules for their internal governance, and tribunals for adjudicating disputes over such matters, the constitution requires that civil courts accept their decisions as binding on them."[144] The court clearly believed that "neutral principles of law" could not be applied to effect a resolution of the dispute in *Gipson*:

> Here, the underlying dispute between the appellee members and the elders is of a long-standing, ongoing, heated nature[145] extending beyond application of our code provisions to an explicit attempt by appellees to convince the church membership that they have a biblically based right to access the records of the church and to determine who the elders of the church will be.[146]

After concluding that the controversy in *Gipson* was essentially religious in nature, the court summarized the beliefs of the elders as to their God-given responsibility to manage all affairs of the congregation.[147] Consideration of those beliefs dictated a decision that "appli-

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140. 295 Ark. at 376, 749 S.W.2d at 299.

141. 280 U.S. 1 (1929). *See supra* notes 21-24 and accompanying text.

142. 426 U.S. 696 (1976). *See supra* notes 39-44 and accompanying text.

143. 443 U.S. 595 (1979). *See supra* notes 50-57 and accompanying text.

144. 295 Ark. at 376-77, 749 S.W.2d at 300 (citing Jones v. Wolf, 443 U.S. 595 (1979)).

145. The case received extensive press coverage throughout the course of the litigation. *See, e.g., Members Press Efforts to See Church Records*, The Ark. Gazette, May 28, 1988, at 6C, col. 5; *Dissolve Legal Entity, Elder Says*, The Ark. Gazette, Mar. 18, 1987, at 1B, col. 1; *Their Salaries, Church Financial Data Told to Members*, The Ark. Gazette, Dec. 17, 1986, at 11A, col. 1; *Lawyer Says He Sought Payment From Church Elders for 'Damages,'* The Ark. Gazette, Nov. 26, 1986, at 16A, col. 1; *Church Member Files Suit, Alleges Elders Abusing Power*, The Ark. Gazette, Jan. 6, 1985, at 1A, col. 3. Gazette coverage over the four years of the suit totalled nineteen articles. One article included a photograph of plaintiff Bob Scott physically attacking defendant and church pastor John Gipson. *Id.*, Jan. 6, 1985, at 1A.

146. 295 Ark. at 377, 749 S.W.2d at 300. The Church of Christ has no written tenets of belief, basing its doctrine solely on its interpretation of the New Testament. *See* Guinn v. Church of Christ of Collinsville, 775 P.2d 766. It is evident from the pleadings and exhibits filed by both parties that this case involved a dispute over that interpretation. *See, e.g.*, Plaintiffs' Affidavits, July 14, 1986, and July 15, 1986; Defendant's Responses to Interrogatories, July 3, 1986. Gipson v. Brown (No. 84-4657).

147. 295 Ark. at 378, 749 S.W.2d at 300-01.

> We find that the record reveals substantial evidence to the effect that the elders' claim of an exemption is in fact tied to established doctrine within the church: (1) the New Testament places within the hands of a select group of elders the sole responsibility for overseeing the affairs of the church and its congregation; (2) the scriptural duty extends to all aspects of administration within the church with the elders being accountable to God for the execution of their responsibility in a manner consistent with the Bible; (3) the scriptural purpose behind the doctrine is that there be harmony and unity within the flock; and (4) the execution of the responsibility is a matter left to

cation of our state corporation laws would almost certainly infringe upon the doctrine of the Church."[148]

With this issue decided, the court applied the requisite balancing test. Beginning with a threshold determination that the evidence showed the elders' disinclination to comply with certain statutory requirements was in fact based on firmly held religious beliefs, the court then weighed the church's right to free exercise of those beliefs against the state's interest in enforcing the disclosure provision of the Non-Profit Corporation Act.[149] Citing *Wisconsin v. Yoder*[150] and *Sherbert v. Verner*,[151] the court declared that there must be "a state interest of sufficient magnitude to override the interest claiming protection under the free exercise clause."[152] The court found no evidence of a compelling state interest which would outweigh the right of the Sixth and Izard Church of Christ to operate according to its doctrine, practice, and polity. The conclusion that the state's interest in disclosure was insignificant rested on a conviction that the entire matter was predicated on an intrachurch dispute: "[in] light of the extent to which the facts before us implicate purely ecclesiastical concerns, the appeal should be dismissed."[153]

Justice Purtle filed a vigorous dissent in both *Gipson II*[154] and *Gipson III*.[155] The basic theme underlying his objection to the majority's decision is that once the Sixth and Izard Church of Christ chose to avail itself of the state's incorporation laws, it could not then refuse to comply with the statute under the "pretext of religious freedom."[156]

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the scripturally guided discretion of the elders as evidenced by biblical admonitions to the flock to obey and submit to them that have the rule over the flock.

Id.

148. *Id.* at 378, 749 S.W.2d at 301.

149. ARK. CODE ANN. § 4-28-218 (1987).

150. 406 U.S. 205 (1972).

151. 374 U.S. 398 (1963).

152. 295 Ark. at 378, 749 S.W.2d at 301 (quoting Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963)).

153. *Id.* As a codicil the court concluded with a reference to its statement in *Gipson I* that this case must be distinguished from the Louisiana decision in Bourgeois v. Landrum, 396 So. 2d 1275 (1981), because the latter involved no questions of entanglement in religious doctrine.

154. 295 Ark. at 379-85, 749 S.W.2d at 301-04 (Purtle, J., dissenting, joined by Dudley and Newbern, J.J.).

155. 296 Ark. 160, 161-65, 752 S.W.2d 752, 753-55 [hereinafter *Gipson III*]. Justice Purtle did not participate in the *Gipson I* decision. 288 Ark. 422, 432, 706 S.W.2d 369, 375.

156. *Gipson II*, 295 Ark. at 381, 749 S.W.2d at 302-03; *Gipson III*, 296 Ark. at 164-65, 752 S.W.2d at 754. Apparently the church incorporation was motivated by the desire to avoid the possibility of personal liability on the part of the elders for promissory notes they signed in conjunction with financing church construction. Supplemental Abstract and Brief for Appel-

In *Gipson II* Justice Purtle argued that the court should have ordered church compliance because the United States Supreme Court has "recognized that under some circumstances civil court review of ecclesiastical actions is appropriate."[157] He found the *Bourgeois* decision indistinguishable from the facts of *Gipson* and saw no constitutional problems in requiring the elders in this case, as had the Louisiana court in *Bourgeois*, to produce the church records as requested. Purtle's discussion of the first amendment question focused not on the conflict between the church doctrine and the Non-Profit Corporation Act, however, but on the issue of the constitutionality of the statute itself: "the statute providing for incorporation is completely void of any reference to religion."[158]

Justice Purtle's opinion in *Gipson III* emphatically rejected the majority's resolution of the case,[159] which he characterized as "an effort to mollycoddle the dominant faction in this church dispute."[160] Purtle believed that the dispute had nothing to do with church doctrine, and stated his view that "[t]he church in this case is using this court to settle its internal bickering."[161]

Although reference is again made to the validity of the Non-Profit Corporation Act,[162] his dissent concentrated on a review of the history of the case. Justice Purtle expressed concern over the plaintiffs' allegations that church funds were being mishandled and concluded that the court should have affirmed the chancellor's decree ordering disclosure of church records.[163] Purtle also zeroed in on the majority's language in *Gipson II* which dismissed the "appeal," agreeing with the plaintiffs' position that the chancellor's order was effective and that the church elders should therefore be held in

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lants at 20, Sept. 3, 1985, Gipson v. Brown (No. 85-180). The majority believed incorporation was in reality only a vehicle for gaining access to church records. *Gipson II*, 295 Ark. at 377, 749 S.W.2d at 300.

157. *Id.* at 383, 749 S.W.2d at 303. Justice Purtle did not mention, however, that in each of the particular cases he cited the Supreme Court ruled that civil court adjudication of the dispute had been inappropriate. *See supra* notes 21-44 and accompanying text.

158. *Id.* at 384, 749 S.W.2d at 304.

159. 296 Ark. at 161, 752 S.W.2d at 753. Justice Purtle began his dissent with the statement that "[t]he Arkansas civil justice system has suffered damage from which it may never recover . . ." and continued, "[f]rom this date forward there is no longer a separation of church and state." *Id.*

160. *Id.*

161. *Id.* at 162, 752 S.W.2d at 754.

162. *Id.* Purtle continually argued the constitutionality of the Non-Profit Corporation Act, which was never an issue in the case.

163. *Id.* at 163-64, 752 S.W.2d at 755. Contrary to Purtle's assertions, the plaintiffs in this case did not include fraud as an element of their cause of action. Complaint, Gipson v. Brown, 288 Ark. 422, 706 S.W.2d 369 (1986) (No. 84-4657).

contempt.[164] He did not, however, address the *per curiam*'s quotation of the mandate issued pursuant to the majority opinion in *Gipson II*, which clearly dismissed the case.[165]

IV.

At first blush the *Gipson* decisions appear to be an example of the "rubber-stamped" establishment of religion to which Justice Rehnquist referred in his *Milivojevich*[166] dissent. However, careful scrutiny of the Arkansas Supreme Court's opinions in this case reveals that, despite reliance on cases involving intrachurch disputes and allusions to the deference principle, the intrachurch dispute in *Gipson* was only one factor in the court's determination that enforcement of the Non-Profit Corporation Act was prohibited as a violation of the first amendment.

The opinions in *Gipson I* and *Gipson II* must be analyzed consecutively in order to fully understand the Arkansas court's disposition of the case. The court began its analysis by following the approach taken by the Supreme Court in *Jones v. Wolf*.[167] In *Gipson I* the court was concerned only with the threshold question of whether or not judicial involvement in the dispute between the members of the Sixth and Izard Church of Christ was a violation of the first amendment. Remand of the case was ordered to effect this determination. The court at this point would agree to application of neutral principles of law if the evidentiary hearing revealed that no doctrinal issue was involved. The subsequent reversal of the chancellor in *Gipson II* was predicated upon the court's conclusion that the special master unconstitutionally applied the "neutral" law relevant to this case—the Arkansas Non-Profit Corporation Act.

The nonjusticiability of the intrachurch dispute was relevant to the decision only because the lower court found that the dispute was doctrinal in nature, and that the doctrine in question, the authority of the elders, was the basis for refusal to comply with the statutory disclosure requirement. The determination that noncompliance with the law was rooted in religious beliefs required the court to apply the balancing test.

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164. *Id.*

165. 296 Ark. at 161, 752 S.W.2d at 753. "It is therefore considered by the Court that the decree of said Chancery Court in this cause rendered be and the same is hereby dismissed in accordance with the opinion herein delivered." *Id.*

166. 426 U.S. 696, 734 (1976).

167. 443 U.S. 595 (1979).

It is at this juncture that Justice Purtle and the majority came to a parting of the ways. Purtle never reached the balancing test because he rejected the free exercise issue at the outset, believing the elders' assertion of religious beliefs to be a "pretext" for avoiding compliance with the law.[168] Purtle's posture on this matter points squarely down the path of "neutral principles" toward a conclusion that the church should have been forced to comply with the statute. He rejected the elders' claim that their refusal to obey the statute was based on biblical, and thus church, doctrine. Application of "neutral principles"—the statute—was therefore permitted under *Jones v. Wolf*.[169] However, once credence is given to the elders' beliefs, the free exercise issue is inescapable and application of the balancing test is required. Upon recognition of the elders' free exercise right, the court, perhaps unwittingly but nevertheless unmistakably, settled the doctrinal dispute.

In judging any claim of "free exercise," a court must of necessity attempt to ascertain the sincerity of the religious belief in question. The majority of the Arkansas Supreme Court accepted the evidence presented by the elders of the Sixth and Izard Church of Christ, which showed that disclosure of their records would violate church doctrine. Justice Purtle's dissents are rooted in what is obviously a doubt about this sincerity and in an acceptance of the findings of the special master. The majority's unwillingness to accept the master's findings was likely based in part on its explicit rejection of that manner of dealing with the issue by the chancery court.

Contrary to the echoes of impending doom which ring through Justice Purtle's dissents, the majority opinions in the *Gipson* cases do not warrant predictions of the collapse of the separation of church and state in Arkansas. At no point does the court indicate that claims of religious freedom automatically place a litigant "above the law," or that courts should mechanically apply the deference principle to intrachurch disputes without thoroughly examining its applicability to a particular set of facts. What is clear, and what is most significant about this case, is that the court will require a clear showing of compelling state interest by those who seek to deny claims to the right to free exercise of religion. The majority emphasizes that the plaintiffs in this case made no such showing, and the "pox on both your houses" attitude of its cursory opinion in *Gipson III* indicates a degree of impatience with a controversy that the court believed was not a proper

168. *See supra* notes 165-71.
169. 443 U.S. 595 (1979).

subject for litigation. A more likely prediction is that *Gipson* will be limited to its facts. What is perhaps also significant about this case is the underlying message it sends to religious organizations of this state: Benefits of incorporation must be weighed against the potential of being embroiled in a civil dispute which a court will ultimately refuse to settle.

Tonia Peoples Jones